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PENNSYLVANIA
SPECIAL EDUCATION HEARING OFFICER

DECISION

DUE PROCESS HEARING

Name of Child: SM
ODR #9708/08-09 LS
#9468/08-09 LS

Date of Birth: XX/XX/XX

Dates of Hearing: March 27, 2009
April 8, 2009

CLOSED HEARING

Parties to the Hearing:

Mr. and Mrs.

Manheim Township School District
2933 Lititz Pike
Lititz, PA 17606-5134

Date Transcripts Received:

Representative:

Amy Slody, Esquire
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April 13, 2009; May 4, 2009;

May 6, 2009

Date of Decision:

May 29, 2009

Hearing Officer:

Deborah G. DeLauro, Esquire

Procedural History

This is the second phase of a bifurcated hearing.¹ The first phase of the hearing was expedited to determine whether Student's misbehavior was a manifestation of Student's disability. Student is a late teen-aged eligible student living in the Manheim Township School District (hereinafter "District"). Student qualifies for special education services and specially designed instruction under the Individuals with Disabilities Education Improvement Act (hereinafter "IDEIA") as a student with an Other Health Impairment (hereinafter "OHI") due to Student's severe Attention Deficit Hyperactivity Disorder (hereinafter "ADHD") and Specific Learning Disabilities (hereinafter "SLD") in the areas of Written Expression and Math Calculation. Student was expelled from the District's public school Student had been attending as a result of Student's violation of the code of conduct. At the conclusion of the first phase of the hearing, this Hearing Officer concluded that Student's behavior was not a manifestation of Student's disability², and Student was placed in an alternative educational placement in the [redacted] (hereinafter "AES"). The programs at AES are operated by [redacted] Intermediate Unit. The AES staff and teachers are Intermediate Unit (hereinafter "IU") employees.

The question in this second phase of the hearing revolves around the appropriateness of the post-expulsion alternative educational placement.

¹ The first phase of the hearing held on December 18, 2008 was assigned ODR No. 9468/08-09 LS. The second phase of the hearing held on March 27 and April 8, 2009 has been assigned ODR No. 9708/08-09 LS. The parties agreed that the "phase 2" evidence supplemented the "phase 1" evidence in this matter. [N.T. 186] See ODR Decision No. 9468/08-09 LS (incorporated herein and attached hereto as Hearing Officer's Exhibit No. 1.)

² On October 28, 2008, the District conducted a Manifestation Determination meeting attended by the director of special education, a high school assistant principal, a high school special education teacher, both parents and Student. (NT 40, 71, 72, 73; S-4) The school-based members determined that Student's actions were not a manifestation of Student's disability. (NT 40, 71-73; S-4)

Issues

Whether Student's placement in the AES is appropriate?

And, if not, whether Student is entitled to compensatory education?

Findings of Fact

1. Student is a late teen-aged student who is a resident of the Manheim Township School District.
 2. Student qualifies under IDEIA as OHI and with a SLD in Written Language and Math Calculations. (NT 13, 74; S-5; S-7; S-8; S-11; S-12)
 3. Student was diagnosed with ADHD when Student was three years old. [NT 13, 20, 37, 51; 264; S-2]
 4. Student takes 60 milligrams of Focalin every morning. That amount is sometimes supplemented at either 10 or 20 milligrams a day. This is three times higher than the amount recommended by the Physician's Desk Reference. [NT 28, 29, 49, 52, 53; S-2]
 5. Student's attention disorder and learning disabilities make it difficult for Student to: (1) take tests that focused on a lecturer for more than 3 minutes [N.T. 75]; (2) remain on task [N.T. 139, 197]; (3) stay organized [N.T. 36, 198, 404]; (4) meet deadlines and complete homework [N.T. 198]; write and take notes. [N.T. 145, 264; S-5; S-12]
 6. In February 2008, the District issued a reevaluation report (hereinafter "RR") wherein it was recommended that Student would continue to benefit from direct instruction and corrective feedback to improve Student's writing mechanics and math calculation skills. Furthermore, the school psychologist noted that Student continued to need accommodations such as use of the spell check program, graphic organizers, and editing checklists for all writing assignments. Student also needed continued support with organization, as well as prompts or cues to focus Student's attention in the classroom. The District's evaluator further suggested that Student's case manager needed to monitor Student's completion of assignments and help with the planning of long-term assignments. Also recommended was preferential seating to minimize distractions, as well as support and instruction in developing study strategies and self advocacy skills. [S-5]
 7. Based on this RR, an Individual Education Plan (hereinafter "IEP") was developed on March 27, 2008 where in addition to specific academic goals in the
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areas of self-management, written language and academic support, the IEP team indicated Student needed to improve work habits, task completion and organizational skills. Student also needed to improve daily use of Student's planner and homework completion, increase focus, put consistent effort in all assignments, and increase skills in written expression and proofreading. [N.T. 197; S-7]

8. Student's March 27, 2008 IEP³ also identifies the following program modifications and specially designed instruction:
- 1) Prompts and cues from teachers to attend to instruction and remain on task;
 - 2) Communication between the school and the parent via regular mail or e-mail (permission slips, signatures, teacher curricular information, sports information, and homework), if Student had not returned them as expected;
 - 3) Examples of completed math problems with all necessary steps must be provided when a new skill is introduced. Use of calculator to help with math calculations;
 - 4) Redirection, structured learning environment, and frequent positive reinforcement. Humor to ease into work that is more difficult and/or stressful;
 - 5) Full credit for work turned in late, (within 5 school days of the due date) due to organization difficulties. If turned in after 5 days, then partial credit to be given.
 - 6) Preparation for [the next] grade: meeting within the first few weeks of the school year to include Student's teachers, guidance counselor, case manager, parents and special education consultant, and 2nd semester if appropriate;
 - 7) Graphic organizers, skeletal out lines, copies of notes if notes are incomplete. (Student is still expected to take notes or fill in skeletal outlines before getting the notes). Highlight, circle, underlying important information.
 - 8) Prompted by academic support teacher, Student will be encouraged to seek additional help before or after school with regular education teachers when Student needs additional support or further clarification of assignments or to prepare for tests;
 - 9) Conferences with Student to review grades and missed work; and
 - 10) Case manager will solicit information from teachers on a weekly basis regarding general homework for the week and any specific missing assignments that Student can turn in for credit. This is to be sent by the classroom teacher, directly to the parents and copied to the case manager. [S-7]

³ This is the IEP which was in place at the time Student transferred to the alternative education placement in the AES.

9. Student established a good relationship with Student's learning support teachers at Student's school (hereinafter "School"). (S-12; N.T. 25, 388-389) Student would come to school early and stay late to receive extra help in core subjects. The learning support teachers would implement Student's IEP by helping Student with organizational skills and providing cueing for attention, breaking assignments down into smaller "chunks," and providing repetition and review. [S-12; N.T. 61, 63, 388-389] As a result, Student was academically successful. [S-12]
10. When asked whether Student had stayed after school to meet with Student's teachers at the AES, Student testified that Student had not because Student would have no transportation home after school and Student did not think that Student's teachers would be available on short notice. [N.T. 224; 243; 245] Student indicated further that the details of staying after school had not been completely explained to Student, how it would work or how Student would get home. [N.T. 245-246]
11. Student never had a discipline problem while attending the School three-plus years). Student never became involved in physical aggression, verbal abuse or disruptive behavior. The misconduct in October 2008 was Student's first incident. [NT 44, 105, 135; 147; S-4; S-2]
12. Student was expelled from the School in January 2009 and placed in the AES. [N.T. 193; 199]
13. The AES is part of the [redacted] County alternative education program and is located in the [redacted]. The AES includes students from 16 school districts in [redacted] County, who are placed there for various reasons under the guidelines of alternative education: they are either there in lieu of expulsion; on a 45 day placement; or they're there for "at risk" problems. Ten out of forty-eight students have IEPs. [N.T. 333-331]
14. In December 2008, the District reevaluated Student at parent's request. The reevaluation report identified the following needs: Student needs to improve work habits, task completion, and organizational skills in regard to daily use of Student's planner and homework completion. Needs to increase classroom focus and put consistent effort and all assignments. Needs to continue to increase skills in written expression and proofreading. Needs to increase participation in classes. Needs to continue to explore career and college options. Needs cueing for attention, breaking down assignments, individual instruction, repetition and review, small group instruction, preferential seating, copies of notes, and individual tutoring. [S-12]
15. The Student's IEP was revised on February 13, 2009 to include the following goals, specially designed instruction and program modifications:

- 1) Direct instruction in work habits and study/organizational skills. Student will meet with Student's learning support teacher each morning to set work completion goals for the day 100% of the time.
 - 2) Direct instruction in maintaining organization of and planning of tasks as well as monitoring progress via daily logs will be provided.
 - 3) Student will use an editing/proofreading checklist to proofread written work prior to submitting for grade.
 - 4) Guided and repeated practice.
 - 5) Given direct instruction and support with daily goal-setting and self monitoring, and with teacher monitoring, Student will implement these strategies to maintain at least 80% in all of Student's coursework for physics and advanced math.
 - 6) Prompts and cues from teachers to attend to instruction and remain on task
 - 7) Access assistance from teachers after school when prearranged to the teachers availability
 - 8) Communication between the school and parent via regular mail or e-mail, if Student has not returned them as expected
 - 9) Redirection, structured learning environment, positive reinforcement, Humor to ease into work that is more difficult and stressful.
 - 10) Full credit for work turned in late (within 5 school days of due date) due to organization difficulties. If turned in after 5 days, then partial credit to be given.
 - 11) Graphic organizers, skeletal outlines, copies of notes, highlighting, circling and underlying of important information. Breaking assignments down, individual instruction and repetition and review.
 - 12) Conference with Student to review grades and missed work.
- [S-13]

16. The February 13, 2009 IEP includes a one page transition plan indicating that Student's postsecondary education and training goal is to increase Student's study skills and organizational skills; Student's course of study is stated as follows: "Student intends to pursue secondary education." Finally, it is stated that "Direct instruction in work habits, study/organizational skills will support achievement of this goal." [S-13]

17. Both the March 27, 2008 and the February 13, 2009 IEPs⁴ reflect Student's ongoing need to develop organizational skills, get assignments done on time, stay focused, take better notes and improve writing skills. [S-7; S-13]

18. The framework at the AES is based on a behavioral level system which focuses on decision making and social skill instruction. [N.T. 299-302; 411] The social

⁴ In the February 13, 2009 IEP, Student's teacher notes in the Present Levels of Performance section that: "Student has a tremendous amount of trouble concentrating on lessons. Student can become fixated on objects to the point of being unable to function. There have been times when Student's concentration was so drawn to a piece of paper, such as a letter, that Student was unable to do anything other than hold or read the letter. [S-13]

- skills curriculum is based on a nationally recognized program for adolescents who have had troubles, and they require instruction in different cognitive, behavioral and rational thinking. Students are expected to participate in building and educational activities. Throughout the day,⁵ Student is exposed to understanding how Student makes choices and that Student's choices have both negative and positive consequences. [N.T. 411]
19. Student is more mature with better behaviors than most of the students at the AES alternative education school. Although Student is provided with a point sheet and is expected to fill it out, Student's teachers stated that Student does not need one. [N.T. 300; 310-312] Student testified that Student is different than the other students at the AES because Student is interested in learning and doesn't have a problem with authority. [N.T. 228-229]
 20. There are many distractions at the AES. [N.T. 254, 405] Classes are frequently interrupted because of a student having a panic attack, a student crying, a student acting out or getting agitated and angry. [NT. 374, 407]
 21. Student testified that Student does not feel safe at the AES because Student can never predict what's going to happen. [N.T. 216] As soon as Student walks in the door, Student gets searched after going through metal detectors. According to Student, home room can be "hit or miss;" in other words; it can be wild and crazy with the students arguing and physically fighting, or it can be sleepy because the students are tired. [N.T. 212, 213]
 22. Student also testified that Student felt uncomfortable at the AES. Student feels overwhelmed⁶ by all of the swearing, the sex and drug talk, and the constant threat of violence.⁷
 23. There are frequent lockdowns which are referred to as "hold switches" where students are kept in their classrooms and are not allowed to switch to their next class period until the disturbance has been dealt with. Typically, the holding of switch lasts 7 to 10 minutes. [N.T. 212, 213, 239] Student testified further that the police are called to the AES just about every day. [N.T. 212; 239]
 24. Parent testified that Student stopped sleeping and lost 20 lbs when Student started attending school at the AES. [N.T. 265]
 25. Since attending the AES, Student has sought the help of psychologist for anxiety issues related to Student's new placement. [N.T. 265-266; 354-355; 385]

⁵ Student attends at the AES from 7:45 am to 1:35 pm daily. [S-15]

⁶ Student doesn't like eating in public or using public restrooms and Student hates being touched which are symptomatic of Student's obsessive compulsive disorder.

⁷ Student reported that one student threatened to kill Student; another threw a basketball at Student's head; many of the students try to engage Student in "play fighting" because [redacted]. [N.T. 213, 216, 305, 355, 385]

26. The IU supervisor of the AES program, confirmed that she observed that Student was having a difficult transition coming into the program at the AES. [N.T. 375] According to her, Student was particularly anxious about eating in the cafeteria and riding the bus. [N.T. 385, 386] She also was aware of Student's anxiety when, for example, Student expressed concerns about the sprinkler system in each classroom and security in the [redacted] room. [N.T. 386] She testified that she took the following steps to address Student's anxiety: She invited Student to come to her office to speak with her when Student was feeling anxious, she spoke with school staff, spent time with Student in the cafeteria, addressed Student's concerns about the bus "proactively," and allowed Student to have some opportunities to make Student feel connected and important, by participating in some service learning projects. [N.T. 409, 410]
27. A review of Student's school schedule [S-15] reveals that Student's first class period is in the learning support room. Although Student is supposed to be receiving homework support and instruction in organization study skills, testimony revealed that such instruction rarely, if ever occurred, and Student reported that Student typically did not work on assignments during this class period. [N.T. 200-201]
28. Student testified that the teacher in the learning support room doesn't make much of an effort to engage Student or help Student and Student feels that she is not really interested in helping Student and would rather read, prepare for her classes and have coffee. [N.T. 235-236] Student stated that Student didn't ask for help from the teacher in the learning support room because Student feels that she is not sincere about wanting to help Student. [N.T. 231-235; 260]
29. When asked on cross examination why Student declined help from the teacher in the learning support room, Student testified as follows:

I have a problem creating relationships with teachers, so I don't take initiative. I wait for them to take initiative, and actually, if they ... actually want to help... they'll help. That's always how it's been. I'm not just going to go about trusting everybody in my life. I just don't do that. And she's never really taken the personal time to try to spark up a trust or anything. It's just basically business. Do you need help? No. Thank God. I can go type on my computer then.

Question: She doesn't say that; does she?

Answer: no. I read people just like anybody can read people. She'd much rather eat her breakfast and drink her coffee. [N.T. 260]

30. A review of the teacher in the learning support room's notes, which chronicled Student's productivity, and Student's reaction to the interventions she offered, reveals a slightly but not totally different picture. According to the notes, most days Student came to class unprepared, lacked focus, declined help, and was unproductive. There were however, a few entries which indicated that Student worked well or simply worked on assignments. [S-19; N.T. 243-244]
31. When asked on cross examination whether she ever observed the teacher in the learning support room providing instruction on how to use organizational tools, the IU supervisor of the AES program stated that she didn't directly observe her teaching Student how to use organizational tools, but that the teacher's notes stated that she did. [N.T. 396-397; S-19]
32. Period Five, Student has math. Student's Trig/Pre-Calculus class was originally designed to be taught using the Keystone program, but the math teacher stated that the program was very difficult to use and navigate. [N.T. 317] She testified further that Student had difficulty focusing on the program in general since Student was supposed to use it independently. [N.T. 318] The math teacher also stopped using the Keystone program, and instead chose to continue using the Keystone book and align the contents with the Pennsylvania state standards. [N.T. 318]
33. During second period, Student attends a physical science class. Student is not enrolled or graded in this class as Student had it in 9th grade. [N.T. 297] Student is supposed to work on Student's other assignments in this class. [N.T. 296-297] The teacher in that class testified that he can help Student with Student's Physics homework when he's not busy with the other students. [N.T. 297] Sometimes this teacher uses Student as a resource because according to the teacher Student does have a higher level of understanding of physics. [N.T. 297]
34. Student attends a Sociology class during third period. [S-15] According to Student, the pace of the class is extremely slow; no homework is assigned, and although there have been a few writing assignments, the majority of the assignments are worksheets or fill in the blanks "off the overhead" which Student is expected to fill out after the teacher has given a lecture or after Student's watched an in-class movie⁸. [N.T. 204-205]
35. To the contrary, the IU supervisor of the AES program testified that Student's sociology class is a high school class and its textbook is written at the 12th grade-college level. [N.T. 369; S-20 .7; S-20.8] However, she acknowledged that many of the AES students have difficulties with taking in large amounts of text in content and so more elementary strategies.[N.T. 369}

⁸ Student testified that Student watched the following movies in class: Gone With the Wind, Night at the Museum, The Outsiders, Animal Farm and a movie on Hitler. These movies were not discussed in class. [N.T. 204]

36. Student started reading *Kaffir Boy* in Student's Fourth period World Literature class but it was abandoned because the students in the class were all at different points in the book and there was a change of teacher.⁹ [N.T. 205-206, 249]
37. Student testified further that frequently, there isn't anything to do in Student's World Literature class, so Student "sits there and makes bracelets...to pass time." [N.T. 205-208] Student did acknowledge that the class was given two packets of information; one the Japanese Concentration Camps and the other "about some man in the water." Student was expected to read the packet and then answer questions in the packet. [N.T. 205-206, 242]
38. The AES is using the Keystone curriculum for Student's science and math¹⁰. The Keystone program is a year-long program which teachers were supposed "to integrate it as best [they] could," since Student was only going to be attending the AES for one semester. [N.T. 284]
39. The Keystone program is a computer-based program which is set up to be independent with help from an online teacher. The Keystone program was designed to allow Student to work independently at school and at home. [N.T. 208; 382; S-13]
40. Student does not have a computer at home. [N.T. 272] The program was slow moving during the first month because neither Student nor Student's teachers knew how to use the program. [N.T. 208, 284, 317; S-13] Although there was a Keystone teacher assigned to support the use of the program at the AES, that teacher was frequently unavailable and unhelpful. [N.T. 284-285] As a result, the program was ultimately abandoned. [N.T. 209; 211]
41. Student's Homeroom and Physics' teacher¹¹, testified that after he "essentially ditched the computer aspect" of the [Keystone program], he used the curriculum outline and Physics book from the program and integrated them with and adapted them to the state standards. [N.T. 285]
42. Student's Physics' instruction is one-to-one with the teacher [N.T. 237] When asked whether he agreed with Student's version of how the Physics course was structured, the teacher indicated that he agreed with Student's version and stated they looked at what they had to cover between the time and the end of the year, realized that there was a time crunch, and decided to do an "interest inventory" to determine what Student would be most motivated to work on and then to see if

⁹ There was a "floating substitute" teaching Student's World Literature class from January to the end of February. [N.T. 205-206] When the regular English teacher came back from other duties in the AES, the students stopped reading *Kaffir Boy*. [N.T. 249]

¹⁰ The Keystone curricular are not generally taught at the AES but were imported at the behest of the District and Student's IEP team so that Student would be taught at a suitable instructional level. [District's Closing Statement]

¹¹ The teacher stated that his certification is in special education and that he is "highly qualified in science and math." [N.T. 282] He has been teaching for 5 years and was a substitute teacher for a year before that.

- they could cover those things as fast as possible so that they would have time to cover those things that might not motivate Student as much. [N.T. 285-286]
43. The teacher assigns homework approximately 4 days a week. Student completes the homework correctly about one third of the time. The only time the teacher considers it a failure is if Student has not completed it or attempted it at all. [NT. 290] The teacher does not move on until Student completes or attempts to complete the assignment. [N.T. 290] Student is able to complete homework in class.
44. The teacher explained that he does not give tests or quizzes because it would be a waste of time since the class is one-to-one and he already has a sense of what Student understands. The teacher testified further that although Student's physics class is not set up with a grading system, he keeps track of Student's grades on each assignment. [N.T. 292]
45. The teacher also stated that he doesn't allow Student to move on until Student's gotten 100%. He agreed that there is a risk that the slow pace of the class might result in Student not completing the Physics' curriculum, including the state standards. [N.T. 292]
46. The IU supervisor of the AES program acknowledged that where the teacher in the learning support room had a difficult time engaging Student; [N.T. 376] Student was very receptive to the physics teacher. Consequently, she redesigned Student's day so that Student now gets help directly from the physics teacher [N.T. 377]
47. Under cross examination, the IU supervisor of the AES program acknowledged that Student's schedule was changed on or around March 28, 2009. [N.T. 391-393] The IU supervisor of the AES program testified further that she did not notify Student's parents about the change in Student's schedule "because she [has] 75 students in the building, and she didn't notify any of their parents that their schedules would be changed." [N.T. 393] The IU supervisor of the AES program also acknowledged that she never contacted Student's parents about their concerns. [N.T. 396]
48. Student also testified that Student is frequently distracted by all of the drama that is occurring in the halls, in the other classrooms and by the telephone calls¹² which are being made by another teacher in the learning support room that first period of the day. [N.T. 229-230]
49. When asked on cross examination whether there were more distractions in alternative educational settings, like the AES, the District's attorney stipulated that there were in every school building including this one. [N.T. 405] However,

¹² Student testified that the teacher frequently would make calls to parents regarding truant students and other similar matters in the learning support room during first period. [N.T. 230-231]

- the IU supervisor of the AES program acknowledged that there were “hold switches” where students don’t move to their [next] class because there’s an incident in the hallway maybe once or twice a day. [N.T. 405-406]
50. Period Five, Student has math. Student’s Trig/Pre-Calculus class was originally designed to be taught using the Keystone program, but the math teacher stated that the program was very difficult to use and navigate. [N.T. 317] She testified further that Student had difficulty focusing on the program in general since Student was supposed to use it independently. [N.T. 318] The math teacher also stopped using the Keystone program, and instead chose to continue using the Keystone book and align the contents with the Pennsylvania state standards. [N.T. 318]
51. Student is also expected to complete homework in Math. Student has a difficult time completing assignments in Math with the math teacher, as well. Student forgets them at home, leaves them in another class, or only has them partially completed when Student arrives in class. [N.T 300-301]
52. Student’s Math teacher, noted on Student’s current IEP that: “[she has] tried to minimize the distractions in class by keeping Student in the front-center of the room. Student sometimes needs prompts to get on task. Student needs additional time for taking tests. [She has] to be very careful not to give Student too many test problems during the test session. Student gets less done when [she has given] Student too much to do. She noted further that it is almost as though Student cannot decide what Student should be doing and, as a result, gets very little done. Student rarely completes an assignment on the due date.” [S-13]
53. In laying out the curriculum, the math teacher expected Student to be able to complete one lesson a day. [N.T. 319] However, Student rarely had Student’s homework completed when Student came to class, so the math teacher would help Student complete the assignments and make the corrections in class. [N.T. 329-330] She explained that since math is a very sequential course, she could not move forward until Student understood where Student was. [N.T. 330]
54. When asked on cross examination whether she thought that she would be able to review all of the state standards in the curriculum she developed for Student by the end of the year, the math teacher answered as follows:
- There’s a very large number of state standards in mathematics and with the time that we’ve been given to work with Student, I do not believe that all of them will be hit. I will do the best that I can to hit as many as possible in the time that I’ve been given.” [N.T. 339-340]
55. When asked whether it was typical to allow a student to dictate their educational instruction by the teacher asking if the student needs help and when the student indicates no, the teacher just lets them be, the IU supervisor of the AES program

responded that it would not be typical, but in Student's case, Student has As and Bs in Student's course, so when Student says Student doesn't need any help, it is logical for the teacher not to give it to Student. [N.T. 400]

56. Student's mother stated that she didn't think that the curriculum her child was receiving at the AES was comparable to the support and preparation Student was receiving in the previous School.¹³ Mrs. [redacted] testified further that she never saw any lesson plans, any outlines or any progress monitoring on goals. [N.T. 265] Never saw Student utilize any new organizational skills or strategies. [N.T. 267] Has never seen any grades or received any mail or email with respect to permission slips, signatures, teacher curriculum, sports information of homework being missed. [N.T. 272]

57. The mother testified that they were told that there was a possibility that the teachers would not be available after school because they had other responsibilities and/or meetings and that Student would have to arrange after-school appointments with Student's teacher ahead of time.¹⁴ [N.T. 276] She stated further it was her understanding that Student would have to check in advance to see if a teacher was available and arrange for transportation home since there was no late bus. [N.T. 271]

Credibility of Witnesses

Hearing officers are empowered to judge the credibility of witnesses, weigh evidence and, accordingly, render a decision incorporating findings of fact, discussion and conclusions of law. The decision shall be based solely upon the substantial evidence presented at the hearing.¹⁵ Quite often, testimony – or documentary evidence – conflicts; this is to be expected as, had the parties been in full accord, there would have been no need for a hearing. Thus, part of the responsibility of the Hearing Officer is to assign weight to the testimony and documentary evidence concerning a child's special education

¹³ The mother reported that Student has not been assigned any research papers, has not had to use citations of any kind. Student's mother testified further that she has seen no evidence that Student is being taught any organization or study skills pursuant to Student's IEP. [N.T. 267]

¹⁴ The mother also pointed out that this kind of thing was difficult for a kid with ADHD; that Student doesn't know what Student needs (sic) trouble until Student's already in the midst of doing [it]. [N.T. 271]

¹⁵ Spec. Educ. Op. No. 1528 (11/1/04), quoting 22 PA Code, Sec. 14.162(f). See also, Carlisle Area School District v. Scott P., 62 F.3d 520, 524 (3rd Cir. 1995), cert. denied, 517 U.S. 1135 (1996).

experience. Hearing Officers have the plenary responsibility to make “express, qualitative determinations regarding the relative credibility and persuasiveness of the witnesses”.

Blount v. Lancaster-Lebanon Intermediate Unit, 2003 LEXIS 21639 at *28 (2003). This is a particularly important function, as in many cases the hearing officer level is the only forum in which the witnesses will be appearing in person.

Student testified at length and credibly. I found Student’s testimony to be direct, sometimes very literal, but always without guile. Student’s descriptions of Student’s daily experience at the AES, Student teachers and the curriculum was detailed and presented a coherent credible picture.

I found Student’s mother’s testimony to be credible without embellishments. Her descriptions of Student’s day-to-day experience at the AES and her efforts to support her child and to communicate her concerns with the staff there were detailed, and supported the testimony of not only Student, but also of Student’s teachers and the program supervisor.

The teachers testifying for the District were clear in their recollection of events and were able to produce contemporaneous documentary evidence of their activities. They were forthright and appeared to give an honest account of their experience with Student, dealing with the everyday events at the AES and the challenges they faced with the curriculum. I found the physics teacher and the math teacher to be highly credible.

I found the IU supervisor of the AES program’s testimony to be more problematic. Although she was clearly the most knowledgeable witness in terms of the program at the AES, under cross examination, she appeared defensive and her testimony

contradicted testimonial and documentary evidence already presented. Consequently, I gave her testimony less weight than the other witnesses.

Burden of Proof

The burden of persuasion, which is one element of the burden proof¹⁶, is upon the party seeking relief. Schaffer v. Weast, 546 U.S. 49, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005); L.E. v. Ramsey Bd. Of Education, 435 F.3d 384 (3d Cir. 2006); In Re a Student in the Ambridge Area School District, Special Education Opinion No. 1763 (2006) In this case, Student bears the burden of persuasion because Student alleges that the Alternative Educational Placement is inappropriate and that he has been denied FAPE since January 5, 2009 through the present.

In November 2005 the U.S. Supreme Court held that, in an administrative hearing, the burden of persuasion for cases brought under the IDEA is properly placed upon the party seeking relief. Schaffer v. Weast, 126 S. Ct. 528, 537 (2005). The Third Circuit addressed this matter as well more recently. L.E. v. Ramsey Board of Education, 435 F.3d. 384; 2006 U.S. App. LEXIS 1582, at 14-18 (3d Cir. 2006). The party bearing the burden of persuasion must prove its case by a preponderance of the evidence. This burden remains on that party throughout the case. Jaffess v. Council Rock School District, 2006 WL 3097939 (E.D. Pa. October 26, 2006). However, application of the burden of proof does not enter into play unless the evidence is in equipoise, that is, unless

¹⁶ Burden of Proof – The Parents requested this hearing and therefore they bore the burden of proof. The burden of proof is in two parts: the burden of production (simply, which party presents its case first) and the burden of persuasion (which side has to convince the decision-maker(s) by a preponderance of the evidence that its position should be upheld).

the evidence is equally balanced so as to create a 50/50 ratio. In this matter the evidence was not in equipoise, and in their case in chief the Parents met their burden of proof on both issues.

Discussion and Conclusions of Law

Students with disabilities are entitled to FAPE under both federal and state law. 34 C.F.R. §§300.1-300.818; 22 Pa. Code §§14.101-14 A school district offers FAPE by providing personalized instruction and support services pursuant to an IEP. FAPE does not require IEPs that provide the maximum possible benefit or that maximize a student's potential, but rather FAPE requires IEPs that are reasonably calculated to enable the child to achieve meaningful educational benefit. Meaningful educational benefit is more than a trivial or de minimis educational benefit. Whether an IEP is reasonably calculated to afford a child educational benefit is to be determined as of the time it is offered to the student and not at some later date. 20 U.S.C. §1412; Board of Education v. Rowley, 458 U.S. 176, 73 L.Ed.2d 690, 102 S.Ct. 3034 (1982); Ridgewood Board of Education v. M.E. ex. rel. M.E., 172 F.3d 238 (3d Cir. 1999); Stroudsburg Area School District v. Jared N., 712 A.2d 807 (Pa. Cmwlth. 1998); Polk v. Central Susquehanna Intermediate Unit 16, 853 F.2d 171 (3rd Cir. 1988) Fuhrmann v. East Hanover Board of Education, 993 F.2d 1031 (3d Cir. 1993); Daniel G. v. Delaware Valley School District, 813 A.2d 36 (Pa. Cmwlth. 2002)

Furthermore, the court in Polk v. Central Susquehanna IU #16, 853 F.2d 171, 183 (3rd Cir. 1988), *cert. denied*, 488 U.S. 1030 (1989), citing Board of Education v. Diamond, 808 F.2d 987 (3rd Cir. 1986) held that “Rowley makes it perfectly clear that the

Act requires a plan of instruction under which educational *progress* is likely.” (Emphasis in the original). The IEP must afford the child with special needs an education that would confer meaningful benefit. The court in Polk held that educational benefit “must be gauged in relation to the child’s potential.” This was reiterated in later decisions that held that meaningful educational benefit must relate to the child’s potential. See T.R. v. Kingwood Township Board of Education, 205 F.3d 572 (3rd Cir. 2000); Ridgewood Bd. of Education v. N.E., 172 F.3d 238 (3rd Cir. 1999).

However, even though all children with disabilities who are removed to an alternative educational setting (hereinafter “AES”) must continue to receive FAPE, the IDEIA modifies the concept of FAPE in these circumstances to encompass those services necessary to enable the child to continue to participate in the general curriculum¹⁷, and progress towards meeting the goals set out in the child's IEP. A district is not required to provide children placed in an AES for disciplinary reasons, with exactly the same services in exactly the same settings as they were receiving prior to the imposition of discipline. However, the special education and related services, the child does receive must enable the child to continue to participate in the general curriculum, and to progress towards meeting the goals set out in the child's IEP. 34 C.F.R. §300.530(d)(i)(2)(3)(4)(5)

Furthermore, Section 300.530(d) clarifies that decisions regarding the extent to which services would need to be provided and the amount of services that would be necessary to enable a child with a disability to appropriately participate in the general

¹⁷ The term “general education curriculum” is used throughout the IDEIA and in these regulations, the clear implication is that there is an education curriculum that is applicable to all children and that this curriculum is based on the state's academic content standards. 71 Fed. Reg. 46.579 (2006)

curriculum and progress towards achieving the goals in the child's IEP may be different depending on the child's needs and educational goals. 64 Fed. Reg. 12.623 (1999)

Therefore, when determining whether a alternative educational placement is appropriate for a child with a disability who violates the code of student conduct 34 C.F.R. §300.530(a) establishes a standard of appropriateness by requiring the continuation of education services “so as to enable the child to continue to participate in the general education curriculum ... and to progress towards meeting the goals set out in the child's IEP.”

Here, Parents argue that the District's placement in the AES does not afford Student a meaningful education. They assert that because of Student's severe ADHD and the concomitant symptoms¹⁸ Student is unable to make meaningful progress on Student's IEP goals and cannot meaningfully participate in the general education curriculum.

The District on the other hand, would have us believe that Student is like students Student's age everywhere; Student thinks some of Student's courses are too easy and at least one of Student's teachers doesn't care about Student. Furthermore, the District asserts that like all students who have been expelled from their school, Student doesn't like the AES, and feels that Student doesn't deserve to be there. Thus, the District argues, none of this distinguishes Student from innumerable other students in similar situations and that the program and placement in the AES offers Student an appropriate education after Student's expulsion.

I disagree. A review of the testimony and the documentary evidence makes it clear that Student is not like all other students who have been sent to an AES for

disciplinary reasons and Student's complaints about the AES are understandable given Student's unique educational needs. Student cannot function effectively with all of the distractions which are part of the AES and many other disciplinary AESs. The chaos which frequently erupts in the halls, the pervasive profanity, Student's fear of being touched, the fact that some of the students want to play fight, all of these things set Student apart from the average student who is being disciplined. Even Student acknowledged that Student was different than most the students attending the AES because Student was interested in learning and didn't have a problem with authority.

Starting with Student's arrival at school where Student is physically searched and has to go through a metal detector, Student is uncomfortable and overwhelmed in this environment. Consequently, it is understandable that Student is not able to get work done during homeroom.

A review of Student's schedule indicates that first period Student is assigned to be with the learning support teacher, where Student is expected to complete Student's Physics and Math homework and to receive direct instruction in organizational and study skills. However, Student is often off task and unmotivated in this environment. The record reveals that there is no direct instruction occurring in this class, and Student is not completing Student's homework because Student is not receiving proper support. Student testified credibly that although the teacher in the learning support room frequently offered to help, Student believed she was insincere and really did not want to help Student. The District argues that there was nothing more that they were obligated to do since Student refused the offer of help. However, a review of the documentary

¹⁸ Trouble concentrating on lessons, is easily distracted, is frequently unable to function because of obsessive compulsive thoughts, and is in need of significant modifications and interventions from teachers.

evidence shows that both of Student's IEPs indicate that Student has always had trouble asking for assistance as evidenced by the fact that Student was working on Student's self advocacy skills. The IEP delineates specially designed instructions and accommodations to address these educational needs. Additionally, the record reveals that Student was able to complete Student's assignments with the help of the previous School's learning support teachers who refused to accept Student's rejection of help. It is clear that at the AES, Student did not receive the type of instruction, Student required pursuant to Student's IEP in order to make meaningful progress on Student's educational goals.

The evidence shows further that Student was expected to work independently in several of Student's classes. First, in Student's Second Period, Physical science class, which Student is not actually enrolled nor graded in, because Student has already taken it, Student is expected to work on other homework. It is clear that, as Student's mother testified, this is essentially a holding tank for Student, where Student is provided no academic instruction and receives no accommodations.

Next, Student is scheduled in a Sociology class, where, although the textbook may be on grade level, the instruction is inconsistent and elementary as a result of the fact that there are many students in the AES who are functioning at a lower academic level. The testimony reveals that the students watched a lot of movies, none of which were directly related to the class readings or worksheets and were not discussed in class. Student stated that Student thought this class was taught on an elementary level. I agree. This class was not providing meaningful educational benefit to Student, who wanted to go to college.

to stay on task and complete assignments,

Student takes world literature during period four. The class was assigned to read a book¹⁹ and expected to complete a packet regarding the book. However, there was a teacher change in March and the book and the packet were abandoned because the students were in different parts of the book. Again, the testimony reveals that the assignments were never completed or graded. In fact, there is un-contradicted testimony that Student started making bracelets in this class in order to pass the time. Again, it would be hard to argue that this class provided a meaningful educational benefit to Student.

The District points out that Student receives one-to-one, highly individualized instruction that is tailored to Student's needs and Student's performance in physics and in math. True and it is also evident that Student's teachers²⁰ are clearly competent and caring. However, there were significant problems using the curriculum which was chosen to address Student's unique, academic needs. The Keystone program, a computer program, was designed so that Student could work independently in school and at home. Unfortunately, not only did Student not have a computer at home, but neither Student nor Student's teachers could figure out how to use the program, which ultimately was abandoned. Instead, both Student's math and physics teachers created a curriculum based on selected topics in the Keystone textbooks, which were chosen in part by Student and aligned them with the state standards. Nevertheless, since Student frequently came to class without all of Student's homework being completed, it was difficult to keep the pace, which was required in order to complete the program, and cover all of the state standards.

¹⁹ *Kaffer Boy*

²⁰ Names redacted.

Although both the physics and math classes were more in sync with the modifications and specially designed instruction identified in Student's IEP, the teachers were still not able to get Student to complete homework, nor did they encourage Student to stay after school. In fact, they did not penalize the Student for failing to come to class prepared or provide Student with the tools and strategies identified on Student's IEP that would help Student to better understand how to complete Student's assignments and come to class more prepared. Therefore, because of the AES's failure to implement Student's IEP, Student was not able to make meaningful educational progress.

Moreover, a review of Student's IEP, makes it clear that Student requires direct instruction in organizational tools and strategies as well as prompting, encouragement, and even pushing in order to complete assignments and make meaningful progress. The fact that Student received A's and B's in Student's subjects does not indicate that Student mastered the material or learned how to better use organizational tools and strategies.

Furthermore, the fact that in Physics, Student was allowed to pick topics that motivated Student most, so that high interest topics could be covered first and less interesting topics would be covered at the end of the course when there would ostensibly be more time to work on them, makes it completely unlike other physics classes in the previous School. The result of the teacher's teaching methodology, although practical and well-meaning, is that Student will not be able to understand physics as a whole, because certain topics will not be covered. This will not provide educational benefit to Student in Student's desired transition from high school to college.

In addition, the transition plan outlined in Student's IEP is woefully lacking and in and of itself makes it questionable as to whether the district was providing Student with a free appropriate public education.

The IDEIA, at 20 USC 1401(34) and 2006 Regulations at 34 CFR 300.43, defines transition services as a coordinated set of activities for a child with a disability that: 1) are designed to be within a results-oriented process, that are focused on improving the academic and functional achievement of the child with a disability to facilitate the child's movement from school to post-school activities, including post secondary education, vocational education, integrated employment, continuing and adult education, adult services, independent living or community participation; 2) based on the individual child's needs, taking into account the child's strength, preferences and interests; and 3) includes instruction, related services, community experiences, the development of employment and other post-school adult living objectives, and when appropriate, acquisition of daily living skills and functional vocational evaluation.

To that end, beginning not later than the first IEP to be in effect when the child turns 16, the educational program for student with a disability must include “appropriate measurable post secondary goals, based upon age-appropriate transition assessments related to training, education, employment, and, where appropriate, independent living skills.” 34 CFR 300.320(b)(1) that IEP also must include “transition services, including courses of studies needed to assist the child in reaching those goals.” 34 CFR 300.320(b)(2) Here, in a review of the transition plan in Student's IEP confirms that the District was not providing Student with FAPE.

Additionally, the record reveals that the program at the AES was not addressing Student's problems with written expression, insofar as Student completed only minimal writing assignments, and never received the feedback from those assignments. Similarly, Student's IEP identifies math as an area of disability, and yet Student's IEP does not include a single math goal. Therefore, I find that the IEP was not reasonably calculated to confer educational benefit.

In summary, it is AES was *de minimis* and insufficient to enable Student to continue to participate in the general education curriculum and to progress towards meeting the goals set out in Student's IEP. Consequently, I find that the program and placement in the AES did not meet the standard for appropriateness of placement in an alternative education setting and thereby failed to provide Student with meaningful educational benefit.

An eligible student who has not received more than a *de minimis* educational benefit is entitled to correction of that situation through an award of compensatory education, for a period equal to the deprivation and measured from the time that the school district knew or should have known of its failure to provide FAPE. *M.C. v. Central Regional School District*, 81 F.3d 389 (3rd Cir. 1996). The school district, however, is permitted a reasonable amount of time to rectify the problem once it is known.

In determining whether an award of compensatory education is warranted, the first step in the analysis is to assess the appropriateness of the program offered by the School District at the time it was offered or provided. *In re: The Educational Assignment of Karyn S.*, Special Education Appeals Panel Opinion No. 1124 (June 4, 2001). An

award of compensatory education for lack of an appropriate program may be based upon implementation as well as the contents of the IEP. *Ridgewood; In re: The Educational Assignment of Zachary S.*, Special Education Appeals Panel Opinion No.1000 (February 28, 2000).

However, compensatory education is an equitable remedy, designed to assure that an eligible student receives all of the special education services to which the student is entitled. It is not, therefore, appropriate to consider countervailing equities in determining whether compensatory education should be awarded, as in tuition reimbursement cases. *In re: The Educational Assignment of Nicholas T.*, Special Education Appeals Panel Opinion No. 1166 (August 17, 2001); *In re: The Educational Assignment of Laura C.*, Special Education Appeals Panel Opinion No. 1183 (October 19, 2001). Rather, once it is determined that a School District has failed to provide FAPE, compensatory education, measured as stated above, must be awarded. *Id.* It is the responsibility of school districts to offer FAPE to all eligible students at all times, In circumstances where compensatory education is due, it is the eligible student who has been deprived of necessary services. Therefore, compensatory education, restores to the child time and services lost during periods when the school district failed to offer or provide FAPE.

Accordingly, since I find that the District failed to provide Student with an appropriate program and placement, I am ordering the District to provide Student with three (3) hours²¹ of compensatory education for each school day from January 5, 2009 to the end of the school year.

²¹ Since by all accounts, Student did make some educational progress in Student's Physics and Math classes, I will not award compensatory education for the full day.

ORDER

It is hereby ORDERED that:

- 1) The Manheim Township School District provide Student with three (3) hours of compensatory education for each school day from January 5, 2009 to the end of the school year.

- 2) The form and utilization of services shall be decided by the Parent, and may include any appropriate developmental, remedial, or enriching instruction, or therapy. The services may be used after school, on weekends, or during the summer, and may be used after the Student reaches 21 years of age. The services may be used hourly or in blocks of hours. The costs to the District of providing the awarded hours of compensatory education shall not exceed the full cost of the services that were denied. Full costs are the salaries and fringe benefits that would have been paid to the actual professionals who should have provided the District services and the usual and customary costs to the District for any contracted services. The District has the right to challenge the reasonableness of the cost of the services.

May 29, 2009
Date

Deborah G. DeLauro
Deborah G. DeLauro, M.Ed., JD
Hearing Officer

